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In the Supreme Court of the United States

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JOHN C. ANGGELIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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In 1969, Richard J. Amick, his wife and two children, were killed in Thailand, and a third child was injured, as a result of a collision between an automobile in which they were riding and a United States Army truck. Petitioner, the representative of the Amick estates, and guardian of the minor child, filed claims under the Military Claims Act, 10 U.S.C. 2731 *et seq.* The Secretary of the Army disallowed the claim on behalf of Richard J. Amick, but approved awards on the other claims, totalling $125,000.

Petitioner declined to accept the settlement and filed a petition in the Court of Claims to review the Secretary's settlement determination (Pet. App. C1-C10). The Court of Claims dismissed the petition on the ground that "plaintiff's alleged claim sounds in tort and is therefore not within the jurisdiction of this court" (Pet. App. 1a).

The Court of Claims correctly so held. In addition, the court lacked jurisdiction since the administrative determination of a claim under the Military Claims Act is "final and conclusive." 10 U.S.C. 2735.

1. The jurisdiction of the Court of Claims is founded upon the Tucker Act, 28 U.S.C. 1491, which waives the government's immunity from suit in five categories of cases—claims founded upon (1) the Constitution, (2) Acts of Congress, (3) regulations of an executive department, (4) express or implied contracts with the United States, and (5) claims "for liquidated or unliquidated damages in *cases not sounding in tort.*" (emphasis added). Thus, Congress specifically excluded tort claims from the jurisdiction of the Court of Claims.

The Court of Claims correctly held that petitioner's claim "sounds in tort" within the meaning of the Tucker Act exclusion, since it would be tort-grounded between private parties. *Eastport Steamship Corp.* v. *United States,* 372 F. 2d 1002, 1013 (Ct. Cl.) the gravamen of petitioner's claim is for personal injuries and wrongful death caused by the alleged negligence of the driver of another vehicle.[1]

Petitioner attempts to avoid the specific tort exclusion in the Tucker Act by alleging that his suit does not seek damages for a tort but rather asserts a claim founded upon the Military Claims Act and implementing Army regulations (Pet. 4-7). Under petitioner's theory, any

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[1] As a tort claim against the United States petitioner's claim would be cognizable under the Federal Tort Claims Act, but for 28 U.S.C. 2680(k) which specifically excludes from the coverage of the Federal Tort Claims Act "[a]ny claim arising in a foreign country."

tort committed by government agents could be said to violate some statutory duty and a claim for resulting damages could thus be said to be founded upon a statute—contrary to the intention of Congress to exclude tort claims from the coverage of the Tucker Act. To determine whether a claim "sounds in tort" for purposes of the Tucker Act exclusion, the substance of the claim must be controlling. See *King* v. *United States*, 390 F. 2d 894, 909 (Ct. Cl.), reversed on other grounds, 395 U.S. 1; cf. *Bigby* v. *United States*, 188 U.S. 400, 409.[2]

2. In the Military Claims Act, 10 U.S.C. 2731 *et seq.*, Congress provided an administrative remedy for claims for property damage, personal injury or death, caused by personnel of the armed forces acting within the scope of their employment. The Act empowers the Secretary of the military service to exercise his discretion in determining both the merits of the claim and the proper compensation up to $15,000 (10 U.S.C. 2733(a)), and provides that any excess over this amount may be reported by the Secretary to Congress for its consideration (10 U.S.C. 2733(d)). Furthermore, the Act provides that the administrative "settlement of a claim" thereunder "is final and conclusive" (10 U.S.C. 2735) and the term "settle" is defined broadly to mean "consider, ascertain, adjust, determine, and dispose of a claim, whether by full or partial allowance or by disallowance" (10 U.S.C. 2731).

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[2] The Court of Claims cases petitioner cites, *Eastport Steamship Corp.* v. *United States*, *supra*, *Hutter* v. *United States*, 345 F. 2d 828, *Ralston Steel Corp.* v. *United States*, 340 F. 2d 663, and *Carlin* v. *United States*, 100 F. Supp. 451, are inapposite. None of those cases involved a claim which, like the instant one, is essentially grounded upon tortious conduct.

Thus, the express language of the Military Claims Act manifests a congressional intention to provide an exclusive administrative remedy for covered claims, subject only to congressional consideration of claims in excess of $15,000. The express declaration that "[n]otwithstanding any other provision of law" the administrative determination "is final and conclusive" unmistakably establishes that Congress did not authorize any court to review that determination.

The exclusion of Court of Claims jurisdiction to review administrative settlements of claims is confirmed by the discretionary character of the administrative determination. See *Williamsport Wire Co.* v. *United States*, 277 U.S. 551, 557; *Dismuke* v. *United States*, 297 U.S. 167, 172. In *United States* v. *Babcock*, 250 U.S. 328, the court considered a similar finality provision of an earlier administrative claims statute and held that it precluded the Court of Claims from reviewing the claim. The Court said that "the United States, when it creates rights in individuals against itself, is under no obligation to provide a remedy through the courts" and that "where a statute creates a right and provides a special remedy, that remedy is exclusive." 250 U.S. at 331.[3]

[3] The petition filed in the Court of Claims alleged that the Secretary's settlement determination (totalling $125,000) was "unreasonably low" and requested the Court to enter judgment for an amount not less than $500,000 (Pet. App. C9-C10). But the Military Claims Act provides that the Secretary can award only $15,000, although it grants him discretion to report the excess of $15,000 to Congress for its consideration (10 U.S.C. 2733(d)). The Act therefore necessarily limits any possible Court of Claims judgment in this case to directing the Secretary to make a more favorable recommendation to Congress. Such a remedy, however, is outside the jurisdiction of the Court of Claims, since it has no power to grant relief not in the form of a money judgment. *United States* v. *King*, 395 U.S. 1, *United States* v. *Jones*, 131 U.S. 1.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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